

1  
2  
3  
4  
5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**  
7

8 CHRISTOPHER A. JONES,

9 Petitioner,

10 vs.

11 E.K. McDANIEL, *et al.*,

12 Respondents.  
13  
14

Case No. 3:05-cv-00582-LRH-VPC

**ORDER**

15 This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a  
16 Nevada state prisoner represented by counsel. This matter comes before the Court on the merits of  
17 the remaining grounds of the second amended petition.

18 **I. Factual Background**

19 The state district court summarized the facts of this case, which were adopted by the Nevada  
20 Supreme Court, as follows:

21 On May 8, 1995, the Defendant physically attacked Almeta  
22 Williams in her home. In an attempt to avoid further assault, Almeta  
23 entered her youngest son's bedroom, locking the door behind her.  
The Defendant, however, broke into the room and continued his  
attack on Almeta, kicking her even when she went to the floor.

24 Almeta's oldest son was awakened by his mother's screams.  
25 He immediately dialed "9-1-1." The Defendant left the residence and  
26 went to his car. When asked by the "9-1-1" operator for the  
27 Defendant's license plate number, Almeta went outside to try to  
28 obtain that information. The Defendant then retrieved a .40 caliber  
handgun and shot Almeta seven (7) times. He then fired several shots  
at Almeta's children, but fortunately, the bullets did not strike either  
of the boys.

1 As a result of these actions, Defendant was charged with,  
 2 among other things, open murder with [the] use of a deadly weapon.  
 3 After a jury trial, he was found guilty of first degree murder with [the]  
 4 use of a deadly weapon.

5 After the jury rendered its verdict, the State agreed to waive  
 6 the penalty hearing and to stipulate to a sentence of life with the  
 7 possibility of parole. Under this agreement, the Defendant would be  
 8 eligible for parole after serving only twenty (20) years of his prison  
 9 term. Had Defendant received any other sentence allowed by statute  
 10 for the commission of first degree murder with [the] use of a deadly  
 11 weapon, he would either not have been eligible for parole until he had  
 12 served at least forty (40) years or not have been eligible for parole at  
 13 all.

14 (Exhibit 74, at pp. 2-3; Exhibit 91, attachment, at pp. 2-3).<sup>1</sup>

## 15 **II. Procedural History**

### 16 **A. State Court Proceedings (1995-2001)**

17 Petitioner was charged, in Nevada's Eighth Judicial District, with one count of first degree  
 18 murder with the use of a deadly weapon, two counts of attempted murder with the use of a deadly  
 19 weapon, and three counts of discharging a firearm at or into a structure. (Exhibit 4.)<sup>2</sup> At the jury  
 20 trial, petitioner was found guilty of first degree murder and was found not guilty as to all other  
 21 counts. (Exhibits 40-41). After the guilty verdict, petitioner entered into a stipulation with the State  
 22 wherein he waived his right to a direct appeal and a separate penalty hearing; he stipulated to a  
 23 sentence of life with the possibility of parole for first degree murder, and a consecutive sentence of  
 24 life with the possibility of parole for the deadly weapon enhancement. (Exhibit 43). On June 25,  
 25 1996, the state trial court adjudged petitioner guilty of first degree murder with use of a deadly  
 26 weapon and sentenced him according to the stipulation of the parties. (Exhibit 48). The judgment  
 27 of conviction was filed on July 1, 1996. (Exhibit 49).

---

28 <sup>1</sup> The summary of background facts is intended only as an overview of the case, in order to  
 provide context for the discussion of the issues. Any absence of mention of specific evidence in this  
 overview does not signify that this Court has overlooked or ignored the evidence. The Court makes  
 no credibility findings or other factual findings regarding the truth of the evidence or statements of  
 fact in the state court.

<sup>2</sup> The exhibits referenced in this order are found in the record of petitioner's first federal  
 habeas case, (*Jones I*), CV-N-01-0038-DWH-VPC, at ECF Nos. 16, 17, 18, 19, and 21. Exhibits are  
 also found in the instant case, (*Jones II*), 3:05-cv-00582-LRH-VPC, at ECF Nos. 3, 5, and 39.

1 On April 22, 1997, petitioner, acting in *pro per*, filed a “motion to withdraw from stipulation  
2 and order waiving separate penalty hearing and waiving appeal” (motion to withdraw stipulation),  
3 along with an affidavit, and points and authorities. (Exhibits 56, 57, 59). On May 14, 1997,  
4 petitioner filed a *pro per* post-conviction habeas petition in the state district court, along with points  
5 and authorities. (Exhibits 68 and 69). The State filed a combined opposition to the motion to  
6 withdraw stipulation and to the post-conviction habeas petition. (Exhibit 71). On June 12, 1997,  
7 the state district court filed findings of fact, conclusions of law, and order denying the post-  
8 conviction habeas petition. (Exhibit 74). In the order, the state district court noted that the post-  
9 conviction habeas petition raised the same claims of error as petitioner raised in his motion to  
10 withdraw stipulation. (Exhibit 74, at p. 3). On the same date, the state district court entered an  
11 order denying petitioner’s motion to withdraw stipulation. (Exhibit 76).

12 On July 9, 1997, petitioner filed a notice of appeal of the denial of his post-conviction  
13 habeas petition to the Nevada Supreme Court. (Exhibit 78). Petitioner filed an opening brief on  
14 December 15, 1997. (Exhibit 87). Nearly three years later, on September 8, 2000, petitioner sought  
15 leave to file additional pages and an amended brief adding additional grounds to the original  
16 opening brief. (Exhibits 88, 89, and 90). The Nevada Supreme Court stamped these documents  
17 “received” on September 8, 2000. (Exhibit 90). On September 11, 2000, one business day after it  
18 received petitioner’s motion to amend and amended brief, the Nevada Supreme Court entered its  
19 order dismissing the appeal. (Exhibit 91). Rehearing was denied on December 29, 2000. (Exhibit  
20 93). Remittitur issued on January 17, 2001. (Exhibit 94).

#### 21 **B. Initial Federal Habeas Petition (2001-2003)**

22 Petitioner’s federal habeas petition was filed on January 18, 2001, in case number CV-N-01-  
23 0038-DWH-VPC (*Jones I*). (ECF No. 2 in *Jones I*). The Court appointed the Federal Public  
24 Defender to represent petitioner in the federal habeas proceedings. (ECF No. 5). On February 21,  
25 2002, through his counsel, petitioner filed a first amended petition setting forth eight grounds for  
26 relief. (ECF No. 15). Through counsel, petitioner filed a second amended petition on April 9, 2002,  
27 again seeking eight grounds of relief. (ECF No. 26). Respondents moved to dismiss the petition,  
28 asserting that Grounds 2 and 8 were not exhausted in state court. (ECF No. 33). On February 25,

1 2003, this Court granted respondents' motion in part, ruling that Grounds 2 and 8 were not  
2 exhausted. (ECF No. 37). On October 3, 2003, this Court dismissed this action without prejudice  
3 to allow petitioner to return to state court to exhaust Grounds 2 and 8. (ECF No. 46). The case was  
4 administratively closed without entering judgment, with a provision for petitioner to return to  
5 federal court after exhausting his claims in state court. (*Id.*).

6 **C. First Return to State Court (2003-2005)**

7 Petitioner returned to the Eighth Judicial District Court of Nevada and filed his second post-  
8 conviction habeas petition on November 19, 2003, raising three grounds for relief: (1) a due process  
9 violation resulting from improper commentary, personal opinions, and disparagement of the defense  
10 in the prosecutor's closing arguments; (2) denial of effective assistance of counsel because there  
11 was no objection to the prosecutor's closing arguments; and (3) denial of effective assistance of  
12 counsel because counsel failed to file a notice of appeal on petitioner's behalf. (Exhibit 102). On  
13 June 11, 2004, the state district court entered its findings of fact, conclusions of law, and order  
14 denying the post-conviction habeas petition. (Exhibit 109). Petitioner appealed and the Nevada  
15 Supreme Court entered an order of affirmance on March 29, 2005. (Exhibits 110 and 114).  
16 Remittitur issued on May 5, 2005. (Exhibit 115).

17 **D. Federal Habeas Proceedings (2005-2008)**

18 Petitioner returned to this Court with a motion to reopen his federal habeas corpus action.  
19 By order filed October 26, 2005, this Court granted petitioner's motion to re-open and assigned the  
20 action the new case number 3:05-CV-0582-LRH-VPC (*Jones II*). (ECF No. 1, in *Jones II*). On  
21 November 30, 2005, an amended petition was filed incorporating the newly exhausted grounds for  
22 relief and supplementing the record. (ECF No. 2; ECF No. 3). On February 13, 2006, respondents  
23 filed a motion to dismiss the petition, asserting that Grounds 2-6, 8, and 9 of the petition were  
24 procedurally defaulted. (ECF No. 8). By order filed July 19, 2006, this Court granted the motion,  
25 finding that Grounds 2, 3, 4, 5, 6, 8, and 9 of the amended petition were procedurally defaulted in  
26 state court, and that petitioner had not made a showing of cause to excuse the procedural default.  
27 (ECF No. 10). Grounds 2, 3, 4, 5, 6, 8, and 9 of the amended petition were dismissed with  
28

1 prejudice. (*Id.*). Respondents were directed to file an answer to the remaining claims in the  
2 amended petition, Grounds 1 and 7. (*Id.*).

3 On October 18, 2006, respondents filed a motion to dismiss Ground 7 of the amended  
4 petition on the basis that it was unexhausted. (ECF No. 15). On August 23, 2007, this Court ruled  
5 that Ground 7 was unexhausted and gave petitioner options for dealing with his mixed petition.  
6 (ECF No. 21). Petitioner sought reconsideration of orders filed July 15, 2003, July 19, 2006, and  
7 August 23, 2007. (ECF No. 22). By order filed June 2, 2008, the Court denied petitioner's motion  
8 for reconsideration and directed petitioner to comply with the Court's order of August 23, 2007,  
9 which required petitioner to choose an option for handling unexhausted Ground 7. (ECF No. 23).  
10 Petitioner filed a motion seeking a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269  
11 (2005), so that he could return to state court to exhaust Ground 7. (ECF No. 28). On November 10,  
12 2008, the Court granted petitioner's motion for a stay and abeyance. (ECF No. 33). The action was  
13 administratively closed while petitioner sought to exhaust Ground 7 in the state courts.

#### 14 **E. Second Return to State Court (2009-2010)**

15 Petitioner returned to the Eighth Judicial District Court of Nevada and filed his third post-  
16 conviction habeas petition on January 16, 2009. (Exhibit 116). On September 30, 2009, the state  
17 district court filed findings of fact, conclusions of law, and order denying the petition. (Exhibit  
18 121). Petitioner appealed. (Exhibit 124). The Nevada Supreme Court filed an order affirming the  
19 denial of petitioner's third post-conviction habeas petition. (Exhibit 131). Remittitur issued on  
20 February 2, 2011. (Exhibit 132).

#### 21 **F. Federal Proceedings (2011-present)**

22 On March 22, 2011, petitioner filed a motion to reopen his federal habeas action. (ECF No.  
23 36). By order filed May 16, 2011, this Court granted petitioner's motion and directed petitioner to  
24 file a second amended petition. (ECF No. 37). On June 15, 2011, through counsel, petitioner filed  
25 a second amended petition. (ECF No. 38). On July 15, 2011, respondents filed a motion to dismiss  
26 Ground 7 of the second amended petition as procedurally barred. (ECF No. 40). Petitioner opposed  
27 the motion (ECF No. 46) and respondents replied (ECF No. 47). Petitioner then filed a motion  
28 seeking leave to supplement his opposition, accompanied by an attached supplemental opposition.

(ECF No. 48). In the same motion, petitioner also sought reconsideration of the Court's dismissal of Ground 8 as procedurally defaulted. (*Id.*). Respondents filed a response, indicating their non-opposition to petitioner's motion for leave to supplement his opposition, but indicating their opposition to petitioner's motion for reconsideration regarding Ground 8. (ECF No. 52). Petitioner filed a reply. (ECF No. 58).

On September 10, 2014, this Court issued an order denying respondents' motion to dismiss Ground 7 of the second amended petition and granting petitioner's motion for reconsideration of the dismissal of Ground 8 of the second amended petition. (ECF No. 60). As to Grounds 7 and 8, the Court ruled that the analysis of cause and prejudice arguments and fundamental miscarriage of justice issues are closely related to the analysis on the merits of the claims. The Court's order directed respondents to file an answer addressing Grounds 1, 7, and 8 of the second amended petition and directed petitioner to file a reply to the answer. (*Id.*). On December 4, 2014, respondents filed an answer. (ECF No. 67). On April 6, 2015, petitioner filed a reply to the answer. (ECF No. 72). Petitioner filed a corrected image of the reply on April 9, 2015. (ECF No. 73). The Court now analyzes the merits of Grounds 1, 7, and 8 of the second amended petition.

### **III. Federal Habeas Corpus Standards**

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d), provides the legal standard for the Court's consideration of this habeas petition:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court

1 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28  
2 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the  
3 Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially  
4 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
5 different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
6 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685,  
7 694 (2002)). The formidable standard set forth in section 2254(d) reflects the view that habeas  
8 corpus is “a guard against extreme malfunctions in the state criminal justice systems,’ not a  
9 substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. \_\_\_, \_\_\_,  
10 131 S.Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

11 A state court decision is an unreasonable application of clearly established Supreme Court  
12 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct  
13 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that  
14 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,  
15 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more  
16 than merely incorrect or erroneous; the state court’s application of clearly established federal law  
17 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining whether  
18 a state court decision is contrary to, or an unreasonable application of federal law, this Court looks  
19 to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);  
20 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9<sup>th</sup> Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

21 In a federal habeas proceeding, “a determination of a factual issue made by a State court  
22 shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the  
23 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). If a claim  
24 has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the  
25 burden set in § 2254(d) and (e) on the record that was before the state court. *Cullen v. Pinholster*,  
26 131 S.Ct. 1388, 1400 (2011).

27 ///

28 ///



#### 1 IV. Merits Analysis of Remaining Grounds of Second Amended Petition

##### 2 A. Ground 1

3 Petitioner asserts that his appeal waiver was not knowing, voluntary, and intelligent because  
 4 he misunderstood the waiver's scope and finality. Petitioner further asserts that the trial court's  
 5 canvass regarding the appeal waiver was insufficient because the court failed to confirm that he had  
 6 been informed of and understood his potential appeal grounds and because it failed to inquire into  
 7 his mental and physical condition at the time of the waiver. (ECF No. 38, at pp. 18-20).

8 Under federal law, to be valid, a guilty plea must be knowing, voluntary, and intelligent.  
 9 *U.S. v. Brady*, 397 U.S. 742, 748 (1970). A guilty plea must represent a voluntary and intelligent  
 10 choice among alternative courses of action open to a defendant. *Hill v. Lockhart*, 474 U.S. 52, 56  
 11 (1985). The court looks to what a defendant reasonably understood at the time of the plea. *U.S. v.*  
 12 *Quan*, 789 F.2d 711, 713 (9<sup>th</sup> Cir. 1986). The record must demonstrate that the defendant  
 13 understands that he is waiving his privilege against self-incrimination, his right to a jury trial, and  
 14 his right to confront accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "Solemn declarations  
 15 in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74  
 16 (1977); *see also United States v. Anderson*, 993 F.2d 1435, 1438 (9<sup>th</sup> Cir. 1993) (defendant's  
 17 statements, made in open court at time of his plea, are entitled to great weight).

18 In this case, after the jury found petitioner guilty of first degree murder with the use of a  
 19 deadly weapon, petitioner and the State entered into a written stipulation to two consecutive  
 20 sentences of life with the possibility of parole, with parole eligibility after 20 years had been served.  
 21 (Exhibit 43). Pursuant to the written stipulation, petitioner waived his right to appeal. (*Id.*). At a  
 22 hearing on May 13, 1996, the state district court canvassed petitioner regarding the stipulation, and  
 23 specifically, his appeal waiver. (Exhibit 42).

24 The Nevada Supreme Court concluded that petitioner's appeal lacked merit for the reasons  
 25 stated in the district court's order denying the first post-conviction petition and motion to withdraw  
 26 the stipulation. (Exhibit 91). The state district court found that petitioner knowingly and  
 27 intelligently entered into the stipulation and appeal waiver. In response to petitioner's claim that he  
 28 was taking mind-altering drugs which rendered him incapable of knowingly and intelligently



1 entering into the stipulation, the court noted that a court-ordered psychological examination  
 2 indicated that he was taking thorazine and sinequan, and that those medications enhanced his mental  
 3 capacity. The report indicated that petitioner was of sufficient mentality to understand and know the  
 4 charges against him, was able to distinguish right from wrong, and was able to assist in trial  
 5 preparation. The court cited *Godinez v. Moran*, 509 U.S. 389 (1993), for the rule that there is no  
 6 higher standard of competency required to plead guilty than to stand trial. (Exhibit 74).

7 In its order of March 29, 2005, the Nevada Supreme Court affirmed the denial of petitioner's  
 8 second post-conviction habeas petition. (Exhibit 114). In the context of petitioner's asserted cause  
 9 and prejudice to overcome procedural bars, the Nevada Supreme Court addressed petitioner's  
 10 allegation that his waiver was involuntary:

11 Moreover, we conclude that Jones also failed to demonstrate prejudice  
 12 to overcome applicable procedural bars. First, Jones argues that his  
 13 waiver of his right to appeal was involuntary because: he did not  
 14 understand the scope of the waiver, his counsel misadvised him  
 15 concerning the merits of an appeal, and the district court inadequately  
 16 canvassed him regarding the waiver. However, Jones acknowledged  
 17 that he had discussed the waiver with counsel, that he understood the  
 consequences of the waiver, and that he was foregoing his right to  
 appeal to secure a life sentence with the possibility of parole.  
 Considering the entire waiver canvass, we conclude that the district  
 court correctly found the waiver to be valid and that Jones fails to  
 demonstrate prejudice with this claim.

18 (Exhibit 114, at pp. 2-3).

19 The state district court's canvass regarding the stipulation included the following discussion:

20 Court: Now, do you understand what it means to give up your right to an appeal?

21 Defendant: Yes, I do.

22 Court: What does it mean?

23 Defendant: It means that at a later date if I have any feelings that the court proceedings or my  
 24 attorneys or the evidence wasn't presented in my favor that I could appeal it and go  
 25 back to court.

26 Court: Well, basically what you would be doing by filing a notice of appeal is you say there  
 27 were some errors of law that we made in this particular case . . . I don't recall  
 28 necessarily what motions Mr. Hillman made, but, you know, obviously he made

1           some objections to certain evidence. Maybe I was wrong on those types of rulings  
2           that I made, but that's what you would be looking for in an appeal to the Nevada  
3           Supreme Court, errors of law that I made in conducting the trial . . . . Are you  
4           willing to forego that to say that in order or exchange to make sure that the State  
5           offers and that I impose a sentence of life with the possibility of parole, you are  
6           waiving your right to have an appeal in this case?

7   Defendant:   That's right.

8   (Exhibit 42, at pp. 5-6). Petitioner argues that his statement that "I could appeal it and go back to  
9   court" indicates that he did not understand that he was waiving his appeal rights. In the view of this  
10   Court, petitioner's response seems to be an attempt to convey his understanding of the concept of an  
11   appeal, rather than an explanation of what the waiver meant. It seems more likely that petitioner  
12   misunderstood the court's question than that he misunderstood the meaning of the terms of the  
13   stipulation. In an earlier exchange during the canvass, petitioner stated that he had read the  
14   stipulation, discussed it with his attorneys, and that he understood its meaning:

15   Court:       Have you had a chance to read the stipulation and order to waive the penalty hearing  
16               and to waive the appeal?

17   Defendant:   Yes, I have.

18   Court:       All right, have you had a chance to discuss this agreement with your attorneys?

19   Defendant:   Yes, I have.

20   Court:       What's your understanding of what is going on by you signing this agreement? And  
21               I'm looking at a signature here Christopher A. Jones. I saw you sign it. What's your  
22               understanding of what is happening here?

23   Defendant:   We are going to forego the penalty hearing, and I'm going to waive my right to  
24               appeal in exchange for life with the possibility of parole.

25   (Exhibit 42, at pp. 3-4). Petitioner's counsel later added that he had discussed potential appeal  
26   grounds with petitioner and determined that the grounds for appeal were few and weak. (*Id.*, at pp.  
27   6-7).

28   ///

1           Petitioner argues that he was taking psychiatric medication that rendered his ability to enter a  
2 knowing, voluntary, and intelligent waiver questionable. Petitioner argues that respondents'  
3 contention that the medications enhanced his mental capabilities is faulty. Petitioner points to the  
4 same psychological report cited by the state district court in its order denying the first state habeas  
5 petition. (Exhibit 95). The finding that petitioner was depressed and that the report questions his  
6 judgment and reasoning faculties does not prove that petitioner lacked the ability to enter a  
7 knowing, voluntary, and intelligent waiver. The report offers several observations regarding  
8 petitioner's mental state, but ultimately concludes that he was able to understand and know the  
9 charges against him, was able to distinguish right from wrong, and was able to assist his attorney in  
10 trial preparation. (Exhibit 95). While petitioner argues that a finding of competency is not  
11 determinative of whether a plea was knowing, voluntary and intelligent, it is one indication of  
12 petitioner's ability to understand the proceedings in which he agreed to the stipulation and waived  
13 his appeal rights. Petitioner has not presented evidence that petitioner's mental state, or any other  
14 factor, invalidated petitioner's waiver of his appeal rights. In light of the written appeal waiver  
15 (stipulation), the entire appeal waiver canvass, and all documents within the state court record, this  
16 Court finds that petitioner's appeal waiver was knowing, voluntary, and intelligent.

17           In sum, the state district court and the Nevada Supreme Court have made factual findings  
18 that petitioner's appeal waiver was knowing, voluntary, and intelligent. (Exhibits 74, 91, 114).  
19 The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Conclusory  
20 allegations will not overcome the presumption that the state court's findings are correct. *Bragg v.*  
21 *Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). Petitioner has failed to meet his burden of proving that  
22 the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of,  
23 clearly established federal law, as determined by the United States Supreme Court, or that the ruling  
24 was based on an unreasonable determination of the facts in light of the evidence presented in the  
25 state court proceeding. This Court denies habeas relief as to Ground 1 of the second amended  
26 petition.

27 ///

28 ///

1           **B. Ground 7**

2           In Ground 7 of the second amended petition, petitioner alleges ineffective assistance of  
3 counsel because his trial counsel failed to object to other bad act evidence stemming from a  
4 previous altercation between petitioner and the victim, Almeta Lynnette Porter Williams, several  
5 months before petitioner killed her. (ECF No. 38, at pp. 29-30).

6           Ineffective assistance of counsel claims are governed by the two-part test announced in  
7 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a  
8 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1)  
9 counsel's performance was unreasonably deficient, and (2) that the deficient performance prejudiced  
10 the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687).  
11 To establish ineffectiveness, the defendant must show that counsel's representation fell below an  
12 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there  
13 is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding  
14 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine  
15 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be  
16 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in  
17 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's  
18 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.  
19 *Id.*

20           Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
21 performance of counsel resulting in prejudice, "with performance being measured against an  
22 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*  
23 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an  
24 ineffective assistance claim, a federal habeas court may only grant relief if that decision was  
25 contrary to, or an unreasonable application of, the *Strickland* standard. *See Yarborough v. Gentry*,  
26 540 U.S. 1, 5 (2003). There is a strong presumption that counsel's conduct falls within the wide  
27 range of reasonable professional assistance. *Id.*

1 As to the substantive claim regarding the admission of bad act evidence, federal habeas relief  
 2 is generally not available to review questions about the admissibility of evidence. *Estelle v.*  
 3 *McGuire*, 502 U.S. 62, 67 (1991). The Ninth Circuit has held that, on habeas review, federal courts  
 4 may not interfere with a state evidentiary ruling, but may only consider whether the evidence was so  
 5 prejudicial that its admission violated fundamental due process and the right to a fair trial. *Fuller v.*  
 6 *Roe*, 182 F.3d 699, 703 (9th Cir. 1999); *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998);  
 7 *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (1993). Federal courts “are not a state supreme court of  
 8 errors; [they] do not review questions of state evidence law. On federal habeas [the courts] may  
 9 only consider whether the petitioner’s conviction violated constitutional norms.” *Jammal v. Van De*  
 10 *Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) (citing *Engle v. Issac*, 456 U.S. 107, 119 (1982)).

11 “Failure to comply with the state’s rules of evidence is neither a necessary nor a sufficient  
 12 basis for granting habeas relief. While adherence to state evidentiary rules suggests that the trial  
 13 was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when  
 14 state standards are violated; conversely, state procedural and evidentiary rules may countenance  
 15 processes that do not comport with fundamental fairness.” *Jammal*, 926 F.2d at 919.

16 Evidence introduced by the prosecution will often raise more than one  
 17 inference, some permissible, some not; we must rely on the jury to  
 18 sort them out in light of the court’s instructions. [Footnote omitted].  
 19 Only if there are no permissible inferences the jury may draw from the  
 20 evidence can its admission violate due process. Even then, the  
 21 evidence must be of such quality as necessarily prevents a fair trial.

22 *Jammal*, 926 F.2d at 920 (internal quotations omitted).

23 In the instant case, the trial court introduced evidence relating to a hunting trip in Ely,  
 24 Nevada, where the victim incurred injuries during an argument with petitioner several months  
 25 before the killing. At trial, petitioner had testified on direct examination as to a positive relationship  
 26 between himself and the victim, testifying that he and the victim were engaged and that they were  
 27 planning to buy a home together. (Exhibit 36, at pp. 77). During cross-examination, the prosecutor  
 28 questioned the victim about statements he had made to police indicating that the victim had broken  
 up with him. The prosecution asked petitioner if he had an “on-again off-again” relationship with  
 the victim and whether he became violent with her at those times when she had broken off the

1 relationship. (Exhibit 36, at p. 104). Petitioner denied that he had been violent with her. (*Id.*). The  
2 prosecution then asked petitioner whether he had injured the victim on a previous occasion during  
3 their hunting trip to Ely. (Exhibit 36, at pp. 107-109). On re-direct, defense counsel had petitioner  
4 explain what happened during the Ely trip. (Exhibit 36, at p. 126). It appears that the prosecution  
5 elicited testimony regarding prior acts during the Ely trip after petitioner had opened the door on  
6 direct examination by testifying that he had a normal and happy relationship with the victim, free of  
7 violence. It appears that the prosecution brought in this evidence to prove motive, intent, plan,  
8 modus operandi, or absence of mistake or accident pursuant to NRS 48.045.

9 While petitioner argues that the prior bad act evidence should not have been admitted under  
10 NRS 48.045 because the prosecution had not met the requirements for invoking that rule, “it is  
11 certainly possible to have a fair trial even when state standards are violated.” *Jammal*, 926 F.2d at  
12 919. “Only if there are no permissible inferences the jury may draw from the evidence can its  
13 admission violate due process. Even then, the evidence must be of such quality as necessarily  
14 prevents a fair trial.” *Id.* at 920. This Court finds that the admission of the prior bad act evidence  
15 regarding events during the Ely trip was not so prejudicial that its admission violated due process or  
16 petitioner’s right to a fair trial. Because the prior bad act evidence did not violate petitioner’s  
17 constitutional rights, petitioner has not shown that his counsel’s failure to object to the admission of  
18 the evidence was unreasonably deficient and that the defense was actually prejudiced as a result of  
19 counsel’s errors. *See Strickland v. Washington*, 446 U.S. at 684.

20 Furthermore, even if the prior bad act evidence should not have been admitted, the error is  
21 subject to this Court’s application of the *Brecht* harmless error rule. Petitioner is not entitled to  
22 federal habeas relief unless he demonstrates that the error “had a substantial and injurious effect or  
23 influence in determining the jury’s verdict” under the independent harmless error standard of *Brecht*  
24 *v. Abramson*, 507 U.S. 619, 623 (1993). The admission of the prior bad act evidence did not have a  
25 substantial and injurious effect or influence in determining the jury’s verdict, particularly  
26 considering the overwhelming evidence of petitioner’s guilt presented at trial. As such, the error  
27 was harmless. *Id.* This Court denies federal habeas relief on Ground 7 of the second amended  
28 petition.

1           **C. Ground 8**

2           Petitioner alleges that his trial counsel was ineffective for failing to object to the  
3 prosecution's closing argument, which petitioner asserts was replete with improper commentary  
4 including personal opinions and disparagement of the defense. (ECF No. 38, at pp. 30-32).

5           In reviewing prosecutorial misconduct claims, the narrow issue that the federal habeas court  
6 may consider is whether there was a violation of due process, and not whether there was misconduct  
7 under the court's broad exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181  
8 (1986). The test is whether the prosecutor's conduct "so infected the trial with unfairness as to  
9 make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416  
10 U.S. 637, 643 (1974)). The Court must distinguish ordinary trial error of a prosecutor from that sort  
11 of egregious misconduct which amounts to a constitutional violation of due process. *Smith v.*  
12 *Phillips*, 455 U.S. 209, 221 (1982). "[T]he touchstone of due process analysis in cases of alleged  
13 prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Id.* at  
14 219. Moreover, determining whether prosecutorial misconduct occurred during closing argument  
15 requires an examination of the entire proceedings so that the prosecutor's remarks may be placed in  
16 the proper context. *Boyde v. California*, 494 U.S. 370, 384-85 (1990). If a cautionary instruction  
17 was given by the trial court, the jury is presumed to have followed it. *Drayden v. White*, 232 F.3d  
18 704, 713 (9th Cir. 2000).

19           The Ninth Circuit Court of Appeals has set forth the standard for prosecutorial misconduct  
20 as follows:

21           "Improper argument does not, per se, violate a defendant's  
22 constitutional rights." *Fields v. Woodford*, 309 F.3d 1571, 1576 (9<sup>th</sup>  
23 Cir. 2002) (quoting *Thompson v. Borg*, 74 F.3d 1571, 1576 (9<sup>th</sup> Cir.  
24 1996)). "[I]t is not enough that the prosecutors' remarks were  
25 undesirable or even universally condemned." *Darden v. Wainwright*,  
26 477 U.S. 168, 181 (internal quotation marks omitted). Rather, "[t]he  
27 relevant inquiry is whether the prosecutor's comments 'so infected the  
28 trial with unfairness as to make the resulting conviction a denial of  
due process.'" *Id.* (quoting *Donnelly*, 416 U.S. at 643). In *Darden*,  
during closing, the prosecutor referred to Darden as an "animal," and  
said that he should not be allowed out of a cell unless he was on a  
leash and that he wished that he could see Darden "sitting here with  
no face, blown away by a shotgun." *Id.* at 181-83, nn. 11 & 12.  
Nevertheless, the Court found that these improper statements did not  
deprive Darden of a fair trial, in part because of the substantial



evidence against Darden, and because the trial court instructed the jury that the arguments made by counsel were not evidence. *See id.* at 181-83; *see also Donnelly*, 416 U.S. at 645 (finding that an improper statement by a prosecutor during closing argument did not amount to a due process violation in part because the judge instructed the jury that the remark was not evidence); *Allen v. Woodford*, 395 F.3d 979, 998 (9<sup>th</sup> Cir. 2005) (finding that prosecutorial misconduct did not amount to a due process violation where the trial court gave an instruction that the attorneys' statements were not evidence and where the prosecutors presented substantial evidence of the defendant's guilt).

*Runnegeagle v. Ryan*, 686 F.3d 758, 781 (9<sup>th</sup> Cir. 2012) *cert. denied* 133 S.Ct. 2766 (2013).

In the present case, petitioner argues that the following statements made by the prosecutor during closing arguments constituted prosecutorial misconduct, and that his trial counsel's failure to object to the statements constituted ineffective assistance of counsel:

1. [Y]ou promised Mr. Koot and me that you would deliver this verdict if we provided you with the evidence. I assure you the evidence is there. There is no reasonable doubt as to the offense of murder in the first degree. (Exhibit 38, at pp. 40-41).
2. Are we all idiots? We just leave our common sense outside on the street – on Third Street – on Carson Street – and we come in here and we get inundated by law and nonsensical BS from lawyers . . . (Exhibit 38, at p. 57).
3. That's still our case. We're still there. No amount of legal instructions. No amount of psychiatric excuse giving is going to change that. (Exhibit 38, at p. 57).
4. Dr. O'Gorman – God bless him – he's been around a long time – no question he's a psychiatrist – he's hired to give an opinion. That's what he has done. He's hired to give an opinion. . . . I mean, I was standing here – come on, Dr. O'Gorman, I know you're here. You're hired by the defense to give an opinion, but don't insult all of us. (Exhibit 38, at p. 59).
5. I don't care how blasted you are out of your mind – quite frankly I doubt if he was that bad off. (Exhibit 38, at p. 62).
6. You know, when I saw the psychiatrist – and we said the defendant saw a psychiatrist – you wonder who really needs a psychiatrist in a case such as this, certainly not the defendant. I mean, he got a psychiatrist to state an opinion. (Exhibit 38, at p. 63).
7. You consider second degree murder only if I haven't done my job and presented sufficient evidence to prove that he intended to kill. (Exhibit 38, at p. 64).

1           8. Now there are so many excuses for everything that people  
2           intentionally do. You bring professionals in to give those excuses.  
3           (Exhibit 38, at p. 66).

4           Petitioner contends that his trial attorney lodged objections to only the statements made at numbered  
5           items 2 and 3. (Exhibit 38, at pp. 57-58). The trial transcript indicates that petitioner's trial attorney  
6           also objected to the statement made at numbered item 5. (Exhibit 38, at p. 62).

7           Petitioner argues that the statements made by the prosecutor during closing statements were  
8           "absolute misconduct" because the prosecutor told the jury that the opinion of the expert witness  
9           was bought and paid for; the prosecutor implied that it was defense counsel who needed a  
10          psychiatrist; the prosecutor referred to the expert testimony as "excuses;" and the prosecutor called  
11          the defense case "nonsensical BS" while implying that the jury would be "idiots" to believe the  
12          defense's case over their own "common sense." (ECF No. 73, at p. 18). The prosecutorial  
13          comments about which petitioner complains must be viewed in context of the entire trial. *See*  
14          *Boyde v. California*, 494 U.S. 370, 384-85 (1990). As in *Darden*, the trial court in the instant case  
15          instructed the jury that "statements, arguments and opinions of counsel are not evidence in this  
16          case." (Exhibit 39, at Jury Instruction No. 32, line 11). Significantly, in this case, the State  
17          presented overwhelming evidence of petitioner's guilt during trial, a fact found by the Nevada  
18          Supreme Court in the context of determining that petitioner failed to overcome state procedural bars  
19          in the March 29, 2005 order, as follows:

20                 Jones contends, second, that comments made by the prosecutor during  
21                 closing arguments constituted prosecutorial misconduct, and third,  
22                 that his counsel was ineffective for failing to object to most of these  
23                 comments. Even assuming that the challenged comments were  
24                 improper, such prosecutorial misconduct may constitute harmless  
25                 error when there is overwhelming evidence of guilt. Here, the record  
26                 reveals overwhelming evidence of Jones's guilt. Consequently, we  
27                 conclude that Jones fails to establish that he was prejudiced.

28           (Exhibit 114, at p. 3). The factual findings of the state court are presumed correct. 28 U.S.C. §  
29           2254(e)(1). Conclusory allegations will not overcome the presumption that the state court's  
30           findings are correct. *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000). The prosecutor's  
31           statements made during closing argument did not so infect the trial with unfairness as to make the  
32           resulting conviction a denial of due process. Because the prosecutor's statements did not rise to the

1 level of prosecutorial misconduct, petitioner cannot show that his counsel's failure to object to each  
2 statement was unreasonably deficient and that the defense was actually prejudiced as a result of  
3 counsel's alleged errors. *See Strickland v. Washington*, 446 U.S. at 684. Petitioner has failed to  
4 meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an  
5 unreasonable application of, clearly established federal law, as determined by the United States  
6 Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of  
7 the evidence presented in the state court proceeding. Federal habeas relief is denied as to Ground 8.

#### 8 **V. Certificate of Appealability**

9 District courts are required to rule on the certificate of appealability in the order disposing of  
10 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and  
11 request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal,  
12 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup>  
13 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v.*  
14 *Mikels*, 236 F.3d 550, 551-52 (9<sup>th</sup> Cir. 2001). Generally, a petitioner must make "a substantial  
15 showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28  
16 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must  
17 demonstrate that reasonable jurists would find the district court's assessment of the constitutional  
18 claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold  
19 inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of  
20 reason; that a court could resolve the issues differently; or that the questions are adequate to deserve  
21 encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this Court's  
22 denial of the remaining grounds of the second amended petition debatable or wrong. The Court  
23 therefore denies petitioner a certificate of appealability.


#### 24 **VI. Conclusion**

25 **IT IS THEREFORE ORDERED** that the remaining grounds of the second amended  
26 petition for a writ of habeas corpus are **DENIED**.

27 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
28 **APPEALABILITY**.

1           **IT IS FURTHER ORDERED** that the Clerk of Court **SHALL ENTER JUDGMENT**  
2 **ACCORDINGLY.**

3           DATED this 8th day of September, 2015.

4  
5  
6   
7 LARRY R. HICKS  
8 UNITED STATES DISTRICT JUDGE  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28